No. 05-__ 05-579 NOV 11 2005

In The
Supreme Court of the United States

LOLA HITHON,

Petitioner,

v.

TYSON FOODS, INC.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under what circumstances, if any, may a plaintiff establish the existence of invidious discrimination in employment by adducing evidence that he or she was better qualified than the individual selected for a disputed position?*

* The same question is presented in *Ash v. Tyson Foods, Inc.*, No. 05-379 and *Higgins v. Tyson Foods, Inc.*, No. 05-535.

LIST OF PARTIES

The parties to this action are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lola Hithon respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 3, 2005.

OPINIONS BELOW

The August 3, 2005, opinion of the court of appeals, which is reported at 144 Fed. Appx. 795, 11th Cir. (2005), is set out at pp. 1a-9a of the Appendix. The July 23, 2004, memorandum decision of the district court, which is not officially reported, is set out at pp. 10a-20a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 3, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 703(a)(1) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 1981 of 42 U.S.C. provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .
>
> (b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

STATEMENT OF THE CASE

This case concerns a promotion decision that was made in the summer of 2000 to the position of Complex Human Resources Manager at the Oxford, Alabama regional (complex) office of Tyson Foods. The vacancy and promotion at issue are the same as the vacancy and promotion in dispute in *Higgins v. Tyson's Foods, Inc.*, No. 05-5104. At the time petitioner, Lola Hithon, an African American female and 40 years of age, was a managerial employee in human resources at the plant level. The position was ultimately awarded to Lisa Burdick, white female and 28 years of age. Plaintiff sued alleging discrimination on the basis of her race and retaliation.

After a period of discovery, Tyson moved for summary judgment stating Hithon must "adduce evidence that **the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face**."

(Doc. 43, pp. 23-24) (bold and underline in original). Tyson relied on Eleventh and Fifth Circuit case law.[1] Hithon, in her opposition, submitted evidence on a range of evidence, but most important was evidence regarding whether Hithon clearly was better qualified than Burdick and whether Burdick even met the minimum qualifications for the position.

In the evidence submitted to the district court was an extensive list of Hithon's job duties and responsibilities compared to those of Burdick during their respective tenure with Tyson. Hithon also relied on the job posting for the human resource position which provided the minimum qualifications. (Doc. 44, Ex. F, Pls. Exs. 5, 7). Hithon exceeded the minimum qualifications (Doc. 44, Ex. F, p. 105) and Burdick, did not even minimally meet the established criteria.[2] Hithon contended that her eleven years of management experience with Tyson, five years of exclusive management experience in the field of Human Resources (Doc. 61, pp. 4-5, 11-13) exceeded Burdick's four years[3] of seniority and one and one-half years of managerial experience in the field.

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[1] *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) (emphasis added) *citing Denney v. City of Albany*, 247 F.3d 1172 (11th Cir. 2001); *quoting Lee v. GTE Florida Inc.*, 226 F.3d 1249, 1253-54 (11th Cir. 2000); *accord, Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339-40 (11th Cir. 2000) (all *quoting Deines v. Texas Dep't of Protective & Reg. Servs.*, 164 F.3d 277, 280 (5th Cir. 1999)).

[2] Allan Trotter, Complex Human Resource manager, testified that the Complex position requires three to five years of management experience not merely time with the company. (Doc. 44, Ex. F, pp. 5, 61-64).

[3] Burdick had worked as a part-time student with Tyson for four years while attending college. (Doc. 44, Ex. F, Pls. Exs. 1, 3, 4).

There was also substantial evidence that Burdick did not meet the written job qualifications. The job posting provided by John Pittard, the white decisionmaker, required three to five years of experience which Allan Trotter stated reflected years of managerial experience, not years of service with Tyson. (Doc. 44, Ex. F, pp. 60-61). Later, Trotter stated the three to five years should be human resource experience. Burdick had less than three years of regular management experience at Tyson. There was a dispute as to whether Burdick could also be credited for her additional experience as a mere trainee. (Doc. 44, Ex. F, pp. 130-131). Ideally, Trotter testified, "you want a candidate with more qualifications than the minimum level." (Doc. 44, Ex. F, p. 129).

Hithon cited to numerous inconsistencies in Tyson's articulated reason for the promotion decision. Tyson contended that factors other than experience and seniority were considered in ascertaining qualifications between the two candidates. For instance, John Pittard, the white decisionmaker, stated that Burdick's references were stronger but admitted he did not seek references for Hithon. (Doc. 44, Ex. C, pp. 136-137). Other managers were only asked for a reference *after* Pittard announced Burdick was the successful candidate. (Doc. 44, Ex. F, pp. 97-99, 131; Ex. C, pp. 55-58, 136). Pittard stated he picked Burdick in part because she would relocate, but Pittard never asked Hithon if she would relocate, but rather assumed Hithon would not. (Doc. 44, Ex. C, pp. 139, 141, 144-148, 320). Relocation was also not a requirement for the position. (Doc. 44, Ex. C, p. 287). Pittard agreed and rated Hithon as having more overall human resource experience than Burdick. (Doc. 44, Ex. C, pp. 162-163).

The district court granted the defendant's motion for summary judgment holding that Tyson's additional subjective criterion, Burdick's college education,[4] and her implementation of a corporate retention program[5] supported Tyson's subjective judgment "that these qualifications counted for more than Hithon's experience." (18a, 19a).

Hithon appealed to the Eleventh Circuit Court of Appeals arguing her qualifications exceeded Burdick's for the human resource promotion in question. Tyson contended that Hithon's lack of a college degree, and perceived inability to relocate, made Burdick the superior candidate over Hithon's greater human resource experience. (Brief of Defendant-Appellee, Tyson Foods, Inc., pp. 44-45). "Any evidence that Hithon might highlight to attempt to establish that she was more qualified than Burdick is far from being 'so apparent as virtually to jump off the page and slap you in its face,' as required by the Eleventh Circuit to show pretext." (Brief of Defendant-Appellee, Tyson Foods, Inc., p. 46).

> "In a failure to promote case . . . a plaintiff cannot prove pretext by simply arguing or even by showing that [he] was better qualified than the [person] who received the position [he] coveted." *Alexander v. Fulton Co., Ga.*, 207 F.3d 1303 (11th Cir. 2000). "Rather, [the plaintiff] must adduce evidence that **the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face'**." *Cofield v.*

[4] A college degree was not a requirement for the position. (Doc. 44, Ex. C, pp. 144-145). Pittard had promoted white individuals within Tyson without a college degree. (Doc. 44, Ex. C, pp. 145-146).

[5] Pittard, the white decisionmaker, testified he could not remember any of the programs Burdick had implemented. (Doc. 44, Ex. C, p. 121).

> *Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) (emphasis added) (*citing Denney v. City of Albany*, 247 F.3d 1172 (11th Cir. 2001)) (*quoting Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1253-54 (11th Cir. 2000); *accord, Alexander*, 207 F.3d at 1339-40) (all *quoting Deines v. Texas Dep't of Protective & Reg. Servs.*, 164 F.3d 277, 280 (5th Cir. 1999)). For the discrepancies to "jump off the page and slap you in the face," they must be of such weight and significance that no reasonable person could have chosen the other candidate over the plaintiff. *Lee*, 226 F.3d at 1254.

(Brief of Defendant-Appellee, Tyson Foods, Inc., pp. 39-40) (bold in original).

Tyson correctly treated the Eleventh Circuit's "slap in the face" standard as equivalent to the Eleventh Circuit's alternative formulation that the differences in qualifications must be "of such weight and significance that no reasonable person could have chosen the other candidate over the plaintiff."

The Eleventh Circuit affirmed the district court's order and relied on *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339 (11th Cir. 2000). In rejecting Petitioner's evidence that she was better qualified than the white applicant who got the job, the Eleventh Circuit held that the disparity in qualifications was not "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen Burdick over Hithon" for the job in question. (9a).

REASON FOR GRANTING THE WRIT

THERE IS A WIDESPREAD CONFLICT AMONG THE CIRCUIT COURTS REGARDING WHEN, OR INDEED WHETHER, EVIDENCE REGARDING COMPARATIVE QUALIFICATIONS CAN BE UTILIZED TO PROVE INVIDIOUS DISCRIMINATION IN EMPLOYMENT

This case concerns the same legal issue and standard raised by the pending petitions for writ of certiorari in *Ash v. Tyson Foods, Inc.*, No. 05-378, and *Higgins v. Tyson Foods, Inc.*, No. 05-535.[6] In *Ash* and *Higgins* the Eleventh Circuit applied its rule that a discrimination plaintiff cannot rely on evidence that he or she was more qualified than the individual selected unless the disparity in qualifications is so great as to "jump off the page and slap you in the face." *Ash v. Tyson Foods, Inc.*, No. 05-378, 7a; *Higgins v. Tyson Foods, Inc.*, No. 05-535, 103a. The petitions in *Ash* and *Higgins* described the important and well-established inter-circuit conflict re-garding that issue.

In the instant case the Eleventh Circuit applied an alternative phrasing of the same standard. Hithon's evidence of her superior qualifications was held insufficient because the disparity in qualifications was not "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen Burdick over Hithon" for the job in question. (9a).

The Eleventh Circuit has repeatedly explained that this "no reasonable person" standard is exactly the same as its "slap in the face" standard.

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[6] The respondent and its counsel are the same in *Higgins* and the instant case.